Investigations - Gen. 3

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OGC Has Reviewed

24 April 1956

MEMORANDUM FOR THE RECORD

SUBJECT: Congressional Committee Subpoenas to Heads of Executive Departments

1. The precedent for refusing information to Congress was set by Washington in 1792 when the House, basing its right to investigate on its control of expenditures, asked the President for papers pertaining to the General St. Clair campaign. Washington and his cabinet came to the unanimous conclusion:

> "First, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion. Fourth, that neither the committee nor House had a right to call on the Head of a Department who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President." (Emphasis supplied)

Washington followed his own precedent in 1796 when presented with a resolution of the House of Representatives requesting a copy of his instructions to the Minister of the United States who negotiated the Treaty with the King of Great Britan, together with the correspondence and documents relative to that Treaty. In closing his message refusing compliance with the House's request he stated:

> "As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty; ... and as it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, as a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request."

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2. Washington's precedent has been followed on numerous occasions since. The Congress and various of its Committees have frequently seen fit to request or demand papers or testimony from the President or from Heads of Executive Departments. No Department Head has complied with such a request when the President deemed a reply undesirable and the request an invasion of the Executive's perogatives. Actually, few of the precedents are in cases of demand for personal appearances alone, but most involve demands on the part of congressional committees to see records. The principle, however, involves information in any form, not just records. Following are pertinent recent cases.

a. The Director of the Federal Bureau of Investigation refused to give testimony or to exhibit a copy of the President's directive requiring him, in the interest of national security, to refrain from testifying or from disclosing the contents of the Bureau's reports and activities.

b. The Director of the Bureau of the Budget refused to testify and to produce the Bureau's files, pursuant to subpoena which had been served upon him, because the President had instructed him not to make public the records of the Bureau due to their confidential nature. Public interest was again invoked to prevent disclosure.

c. The Secretaries of War and Navy were directed not to deliver documents which the committee had requested, on grounds of public interest. The Secretaries, in their own judgment, refused permission to Army and Navy officers to appear and testify because they felt that it would be contrary to the public interests.

d. In March 1948 Dr. John R. Steelman, Confidential Adviser to the President, refused to appear before the Committee on Education and Labor of the House, following the service of two subpoenas upon him. The President directed him not to appear.

3. Most of the above material was presented to the President in May 1954 in a memorandum on separation of powers by Attorney General Brownell. Mr. Brownell closed his memorandum to the President with the following:

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"Thus, you can see that the Presidents of the United States have withheld information of Executive departments or agencies whenever it was found that the information sought was confidential or that its disclosure would be incompatible with the public interest or jeopardize the safety of the nation. The courts too have held that the question whether the production of the papers was contrary to the public interest, was a matter for the Executive to determine.

"By keeping the lines which separate and divide the three great branches of our Government clearly defined, no one branch has been able to encroach upon the powers of the other.

"Upon this firm principle our country's strength, liberty and democratic form of government will continue to endure."

4. Mr. Brownell's position, as stated in closing his memorandum to the President, accords with the conclusions reached by a long line of predecessors in the office of Attorney General and with the position taken by Presidents since Washington's administration. It was restated in well reasoned detail by Attorney General Robert Jackson in 1941, when he declined the request of the House Committee on Naval Affairs to furnish reports in connection with Department of Justice investigations arising out of labor disturbances and subversive activities in industrial establishments having naval contracts. (40 Op. A.G. No. 8.)

5. In addition to the line of precedent set forth above the Director, if requested to give information to a Congressional Committee, may cite his duty to comply with National Security Council Intelligence Directive No. 12, "Avoidance of Publicity Concerning the Intelligence Agencies of the U. S. Government." Paragraph 3 directs that:

"In cases where the disclosure of classified information is sought from the Director of Central Intelligence, and he has doubt as to whether he should comply, the question will be referred to the National Security Council."

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Office of General Counsel

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